DIRECTOR-GENERAL OF INLAND REVENUE

v.

KHOO EWE AIK REALTY SDN. BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 01-8 OF 1989]
14 MAY 1990

REVENUE LAW: *Sale of land - Whether or not an adventure in the nature of trade - Whether profits of sale subject to income tax and development tax - Income Tax Act 1967, s. 4(a) and Schedule 5.*

On 2 February 1989 an appeal by the appellant against the order of the Special Commissioners of Income Tax (who held that the sale of the respondent's land was not an adventure in the nature of trade and that the profits thereof were not taxable) was dismissed by the Judge. In this present appeal to the Supreme Court the appellant submitted that the learned Judge was wrong because the respondent was a trading company and was in fact carrying on an adventure in the nature of a trade. The respondent contended that the learned Judge was correct in upholding the Special Commissioners' finding of fact that the sale was not in the nature of a trade.

Held:

[1] The decision of the Special Commissioners as to the facts of the case is conclusive. A Court should not disturb such findings of fact unless it considers that the only reasonable conclusion on the evidence contradicts it.

[2] The question as to the meaning of "an adventure in the nature of a trade" is a question of law. In the present case, the Court is satisfied that there is sufficient evidence to support the Commissioners' decision that the sale of land did not constitute an adventure in the nature of a trade. Consequently, gains or profits from the sale were not chargeable to tax under s. 4(a) of the Income Tax Act 1976.

[Appeal dismissed.]

Cases referred to:

Tempest Estates Ltd. v. Walmsley (Inspector of Taxes) [1976] STC 10
Rellim, Ltd. v. Vise (H.M. Inspector of Taxes) 32 TC 254
E. v. Controller-General of Inland Revenue [1970] 2 MLJ 117
Edwards (H.M. Inspector of Taxes) v. Bairstow & Harrison 36 TC 207
Leeming v. Jones 15 TC 333
International Investment Limited v. Controller-General of Inland Revenue [1979] 1 MLJ 4
Griffiths v. J.P. Harrison, (Watford) Ltd. [1962] 1 All ER 909
Director-General of Inland Revenue v. L.C.W. [1975] 1 MLJ 250
Kota Kinabalu Industries Sdn. Bhd. v. Director-General of Inland Revenue [1981] 2 MLJ 186
Thew v. South West Africa Co. Ltd. 9 TC 141

Legislation referred to:

Income Tax Act 1967, paras. 34, 39, 41 and 42 of Sch. 5, ss. 2, 4(a)

For the appellant - Zaleha Zahari
For the respondent - Nik Saghir b. Mohd. Noor; M/s. Nik Saghir, Yaacob & Ismail

JUDGMENT

Gunn Chit Tuan SCJ:

This was an appeal by the Director-General of Inland Revenue (the appellant) against the judgment of the High Court given at Kuala Lumpur on 2 February 1989. The learned Judge had dismissed the appellant's appeal against the deciding order of the Special Commissioners of Income Tax who had decided that the disposal of a piece of land known as Lot No. 1, Section 1, Town of Batu Ferringhi (formerly known as Lot 132(2) Mk. 17, Batu Ferringhi, Penang and hereinafter referred to as "the subject land") with an area of approximately 37 acres owned by Khoo Ewe Aik Realty Sdn. Bhd. (the respondent) was not an adventure in the nature of trade and that the profit of the disposal was not assessable to income tax and development tax amounting to RM6,926,394.40 as it was the realisation of an investment.

The Special Commissioners of Income Tax in their Case Stated for the opinion of the High Court pursuant to paras. 34 and 35 of Schedule 5 to the Income Tax Act 1967, found, *inter alia*, that the following facts were proved or admitted:

Mr. Khoo Ewe Aik (deceased) and his wife, Ooi Jeu Yen (also deceased) were landed proprietors of real properties situated in the State of Pulau Pinang. Amongst the real properties owned by the late Mr. Khoo Ewe Aik (hereinafter referred to as "the grandfather") was the subject land. It was acquired by the grandfather in 1935 for RM4,100 and was zoned for agriculture. On 27 December 1975 the grandfather and his now deceased wife (hereinafter referred to as "the grandmother") formed and incorporated a family investment company, the respondent, the two subscribers of the respondent being the grandfather and the grandmother who were also the permanent directors of the respondent. The respondents, *inter alia*, were empowered - under the objects clause and other clauses of its Memorandum of Association - to engage in land investment, land development, land improvement etc. or to purchase and then to sell and turn to account land so purchased or land which comprised an investment.

On 13 February 1976, the respondent passed a Board resolution to accept the transfer of several landed properties from the grandfather and grandmother. On 14 February 1976, the grandfather as one of the two permanent directors authorised the respondent to transfer his beneficial entitlement in the share capital of the respondent to his children and grandchildren. The combined total of the shares of the grandfather and grandmother so allotted amounted to 1,450,000 shares at the par value of RM1 per share and consequently on 30 June 1976 the respondent by a board resolution resolved to allot a total of 1,449,998 shares which represents the consolidated allotments. The allotment exercises were a means by which the grandfather, and the grandmother divested themselves of their beneficial interests in the landed properties and share investments, and of distributing portions of them (in the form of shares) to the said children and grandchildren and to safeguard family control of the landed properties. The allotment of shares to the various shareholders by the respondent did not constitute an adventure in the nature of trade and the appreciation in value (if any) was of a capital nature.

For the basis year 1977 the respondent submitted a layout plan on 23 May 1977 to the George Town, Penang City Council for the construction of 130 housing units for a housing scheme in respect of the subject land e.g. the proposed conversion from agricultural land to housing land for residential purposes; this plan, however, was retracted in year 1981. There was no application for subdivision of the subject land or its adjoining lot, Lot 132(1). For the accounting year ended 31 January 1977, the respondent treated the subject land as a "current asset" in its Balance Sheet under "development account"; the other lands owned by it were treated as "fixed assets". For the accounting year ended 31 January 1980, the respondent treated the subject land as a "fixed asset" in its Balance Sheet; the entry under "Development

Account" for the said accounting year, under "Current Assets" is with reference to land other than the subject land, i.e. land purchased on 27 August 1979 in the Permatang Pauh Industrial Zone for the purpose of renting out light industrial units as an investment. At about that time the respondent applied for the proposed conversion of land use, subject land was situated within the village of Batu Ferringhi which had by then developed from a small fishing village into Penang Island's most attractive tourist resort in an area of several luxury hotels on the seaward side, with more luxury hotel projects in the offing. There was a rise in land prices during 1978-1981. As at 17 June 1980 the subject land was worth RM12,960,000 (in the event of a forced sale) and this value was credited to the Capital Reserve Account in the Balance Sheet as at 31 January 1981 as part of a revaluation exercise.

By a written option dated 17 May 1980 (subsequently extended to 24 June 1980) an option was given by the respondent to one Lim Seng Keat (acting on behalf of Lip Sin Co. Sdn. Bhd.) to purchase the subject land, and Lot 439 (Mukim 17, N.E.D. Penang). The option was eventually exercised and on 6 August 1980 the respondent entered into an agreement of sale with Lip Sin Company Sdn. Bhd. (hereinafter referred to as "Lip Sin") wherein the respondent agreed *inter alia* to:

(i) form Gold Vale Development Sdn. Bhd. (hereinafter referred to as "Gold Vale");

(ii) transfer the subject land to Gold Vale;

(iii) accept in consideration of the said transfer to Gold Vale, 14,600,000 shares issued at par by Gold Vale to the respondent worth RM14,600,000, i.e. at RM1 per share representing the whole paid up capital of Gold Vale;

(iv) sell the said 14,600,000 Gold Vale shares to Lip Sin for RM11,075,086.90, i.e. at 75.45 cents per share, to be paid for by a deposit and five instalments, the last instalment payable by 10 July 1982;

On 27 September 1980, a wholly owned subsidiary of the respondent, Gold Vale was formed and in October 1980 respondent transferred the subject land to Gold Vale for a consideration of RM14,600,000 in the form of shares in Gold Vale which Gold Vale issued to the respondent. The sale of the said Gold Vale shares by the respondent to Lip Sin was in effect a sale of the subject land by the respondent to Lip Sin.

For the accounting years ended 31 January 1977 to 31 January 1979 the intention of the respondent was to become a housing developer selling luxury holiday bungalows, and until the accounting year ended 31 January 1980 it changed from being an investment company to being a company with the intention of embarking on an adventure in the nature of trade with respect to the subject land. However, from the accounting year ended 31 January 1980 the respondent again changed its intention from being that of a housing developer to that of an investor again thereby refraining from building houses on the subject land and withdrew its layout plan it had submitted to the George Town City Council. Taman Terubong Sdn. Bhd. (its wholly owned subsidiary) was allotted the task of housing development. The accounts of the respondent with regard to the description of the subject land first as a current asset, and then as a fixed asset in its Balance Sheet (as previously explained) reflect the true position.

The respondent sold the subject land because

(i) it was running at a loss.

(ii) Taman Terubong Sdn. Bhd. was allotted the task of housing development;

(iii) the respondent wished to revert back to being an investment company after its flirtation with the idea of housing development;

The sale of the subject land was the only sale transaction entered into by the respondent at the material time with an outside party, i.e. to a person which was not a wholly owned subsidiary and the sale of the subject land whether to Gold Vale or to Lip Sin was the realisation of a capital asset. The proceeds of the sale of the subject land were mostly reinvested as the respondent had reverted to its original character as an investment company after its temporary change of intention of being a housing developer. Taman Terubong Sdn. Bhd. was formed for the purposes of being a housing developer but has no housing developer's licence and has not built any houses for sale; nor have any subsidiary done so.

By notice of assessment dated 4 December 1982 for Year of Assessment 1982, the respondent was assessed to income tax in the amount of RM6,926,394.40 based on the proceeds arising from the transfer of the subject land to Gold Vale as follows:

Sale Price	RM14,600,000.00
Less Expenses	710,866.00
	RM13,889,134.00
Tax on RM13,889,134.00 at 40%	RM5,555,653.60
Excess Profits Tax	676,284.10
Development Tax	694,456.70
Total	RM6,926,394.40

The respondent appealed to the Special Commissioners against the said assessment.

In his judgment the learned Judge noted that the appellant had relied on *Tempest Estates Ltd. v. Walmsley (Inspector of Taxes)* [1976] STC 10 in which case the properties of a family were transferred to a company. The prime purpose of the formation of the company in that case was to avoid estate duty by transferring to the company part of the land of the Tempest Estate which was likely to increase in value for development and consequently to attract estate duty at a higher rate instead of at a lower for agricultural property. The Chancery Division held that although the company was formed for the purpose of saving estate duty, it was on the facts of that case carrying on a trade. The learned Judge however agreed with the Special Commissioners that case could be distinguished from this case because (1) the subject land was sold in one transaction apart from a previous transfer to its wholly owned subsidiary company (Taman Terubong Sdn. Bhd.), whereas the Tempest land was sold in a series of transactions "over the years"; (2) the respondent in the instant appeal had real investments such as shares and bank deposits, whereas the Tempest company only owned agricultural lands with building potential in respect of which low rentals were obtained; (3) the Tempest land was transferred to the trading account of the company as in the case of the respondent's subject land. In the instant case the subject land was transferred back as a fixed asset which was not so in the case of the Tempest land; (4) there was no evidence that the proceeds from the sale of various portions of the Tempest land were reinvested; (5) the respondent was formed for investment purposes to safeguard the family properties and to distribute them; in the case of the Tempest company it was formed to avoid tax.

The learned Judge also noted that the Special Commissioners had concluded that the sale of the subject land was to Lip Sin Co. Sdn. Bhd. and his Lordship found that the Special Commissioners had made a correct decision in law when they decided that the sale of the subject land to Lip Sin & Co. Sdn. Bhd. was not an adventure in the nature of trade. He also observed that it was true that the respondent had spent money for the purpose of putting up a lay-out plan for the development of the subject land but the lay-out plan was never approved by the Penang City Council and was withdrawn when the respondent reverted to its status of an investment company. The subject land was agricultural land and was not subdivided. Nothing was physically done by the respondent to the land to improve its value which appreciated due to rapid development of the surrounding area. The learned Judge also agreed with the finding of the Special Commissioners that at the time of the disposal of the subject land the company had reverted to the status of a firmly investment company and following *Rellim, Ltd. v. Vise (H.M. Inspector of Taxes)* 32 TC 254 he held that the question of facts was for the Special Commissioners to find and he was satisfied that they had evidence on which to reach their decision and therefore dismissed the appellant's appeal with costs.

In the appellant's memorandum of appeal to the Supreme Court it was stated that the decision of the learned Judge was unsustainable and fundamentally wrong in law when he held that the Special Commissioners had arrived at a correct decision. It was also stated that the learned Judge had erred in law when he held that the sale of the subject land did not constitute an adventure in the nature of trade and was not assessable to tax under s. 4(a) of the Income Tax Act 1967.

Before us Cik Zaleha Zahari, Senior Federal Counsel for the appellant, in contending that the learned Judge was wrong in upholding the decision of the Special Commissioners stated that the respondent was a trading company and had in fact carried on an adventure in the nature of trade. She pointed out that the respondent was formed in 1975 and contended that the Court should consider what the company did since then and that Mr. Khoo and his wife only transferred their properties to the respondent in 1976 in exchange for shares. She also pointed out that the respondent had granted an option for the sale of the subject land and another piece of land (pp. 71 and 77 of Vol. 2 of the Record of Appeal). She then contended that the Special Commissioners were wrong to hold as a fact that the respondent had a change of intention from becoming a trading company back to an investment company and that the learned Judge had also erred in drawing wrong inferences. After referring to the finding of the Special Commissioners that the respondent had a change of intention she contended that there was no such change of intention because the Special Commissioners had failed to consider the said option which was exercised by Lip Sin Co. Sdn. Bhd. on 24 June 1980 (p. 82 of Vol. 2 of the Record of Appeal). She then referred to a passage from the judgment of the former Federal Court in *E. v. Controller-General of Inland Revenue* [1970] 2 MLJ 117, 123 in which Gill FJ (as he then was) referred to the House of Lords' decision in *Edwards (H.M. Inspector of Taxes) v. Bairstow & Harrison* 36 TC 207 in which that Court considered the following four conditions approved in *Leeming v. Jones* 15 TC 333 one of which must be present to establish the existence of an adventure in the nature of trade:

(i) the existence of an organisation,

(ii) activities which lead to the maturing of the asset to be sold,

(iii) the existence of special skill, opportunities in connection with the article dealt with,

(iv) the fact that the nature of the asset itself should lend itself to commercial transaction.

Cik Zaleha then contended that conditions 1, 2 and 4 above have been complied with.

Then after referring to the memorandum and articles of the respondent (p. 7 of Vol. 2 of the record of appeal) Senior Federal Counsel referred to *International Investment Limited v. Controller-General of Inland Revenue* [1979] 1 MLJ 4 and submitted that there was evidence in this case of the badges of trading and that a single transaction could amount to trading. She stated that the respondent had power in its memorandum and articles to deal with land and there were activities such as the scheme to form Gold Vale and other subsidiaries by the respondent which she claimed had led to the maturing of the asset sold.

Encik Nik Saghir bin Mohd. Noor, Counsel for the respondent, began his submission by referring to para. xxxiii of the Case Stated (p. 36 of Vol. 1 of the record of appeal) and pointed out that the Special Commissioners did consider the said option given by the respondent to Lip Sin Co. Sdn. Bhd. to purchase the subject land. He stated it was true that the learned Judge did not refer to the option which is not relevant for the purpose of arriving at a decision in this case. The issue, he pointed out, was whether the proceeds arising from the sale of the subject land to Lip Sin Co. Sdn. Bhd. constituted gains or profits from a business chargeable to tax under s. 4(a) of the Income Tax Act 1967. Counsel stated that the proceeds would be taxable if circumstances surrounding the sale of the subject land amounted to an adventure in the nature of trade, and pointed out that the Special Commissioners had made their finding of facts which were accepted by the learned Judge in the High Court and the appellant had not shown in the High Court that their decision could not be maintained because of the lack of evidence. He also referred to the oft-quoted case of *Edwards v. Bairstow* (*supra*) on the question of whether a Court can reverse the decision of the Special Commissioners and to the following passage in the judgment of Lord Radcliffe:

> I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur.

Applying the test propounded by Lord Radcliffe, Encik Nik Saghir contended that one could safely say that the Special Commissioners' decision in the present case is not one where the "only reasonable conclusion contradicts the determination". On the other hand, he contended, the facts and the evidence in this case supported the determination of the Special Commissioners. He submitted that the case must be looked at as a whole, and that reading the case one gets the picture that a family company (the respondent) was formed as a means by which the grandfather and the grandmother could divest their interests in their properties to their children and their grandchildren by giving them shares in the respondent to which they have transferred their landed properties. Counsel then pointed out that the respondent was first an investment company but later changed its intention to that of a developer. Yet later on, that is, as from the accounting year ending 31 January 1980, it reverted back to an investor and it sold the subject land as an investor and not as a trader in land. He pointed out that facts in favour of the conclusion arrived at by the Special Commissioners were overwhelming. The respondent is a family company and the subject land was one of those transferred by the grandfather. The memorandum of association indicates its main intention as that of property investment. Although it changed, its intention to that of a developer, it reverted back to that of an investor before it disposed of the subject land. One of the reasons for coming to that conclusion is the entry in the accounts and such conclusion by the Special Commissioners, he contended, should not be disturbed by the High Court on appeal as in

the Privy Council case of *International Investment Limited v. Controller-General of Inland Revenue* (*supra*). Another reason for the conclusion by the Special Commissioners was the subsequent conduct of the respondent in reinvesting the proceeds of sale in investment properties which also confirmed that it is an investment company.

It is hardly necessary for any lawyer to be reminded that under our Income Tax Act 1967 (paras. 34, 39, 41 and 42 of Schedule 5 of the Income Tax Act 1967) one may only appeal to the High Court and thence to the Supreme Court on a question of law. The decision of the Special Commissioners of Income Tax as to the facts is therefore conclusive. In this connection, it is interesting to note the following statement by Lord Denning on the powers of the High Court on appeal in *Griffiths v. J.P. Harrison, (Watford) Ltd.* [1962] 1 All ER 909, 916:

> Now the powers of the High Court on an appeal are very limited. The Judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is "erroneous in point of law". Now here the primary facts were all found by the commissioners. They were stated in the Case. They cannot be disputed. What is disputed is their conclusion from time. It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. It is not sufficient that the Judge would himself have come to a different conclusion. Reasonable people on the same facts may reasonably come to different conclusions: and often do. Juries do. So do Judges. And are they not all reasonable men? But there comes a point when a Judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere.

A Court would not therefore disturb findings of fact by the Special Commissioners unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners (see *Edwards v. Bairstow* (*supra*), *Director-General of Inland Revenue v. L.C.W.* [1975] 1 MLJ 250, 251 and *Kota Kinabalu Industries Sdn. Bhd. v. Director-General of Inland Revenue* [1981] 2 MLJ 186, 190).

Now s. 4(a) of the Income Tax Act 1976 is concerned with tax which is chargeable on income in respect of gains or profits from a business, for whatever period of time carried on. The word "business" is defined in s. 2 of the said Act to include a "profession, vocation and trade and every manufacture, adventure or concern in the nature of trade, but excludes employment". In this case the question was whether or not an adventure in the nature of trade was being carried on and the Special Commissioners had to consider all the circumstances of the case and their finding would be one of fact. The broader question as to the meaning of adventure in the nature of trade would however be one of law.

As for the contention of the Senior Federal Counsel that the respondent was a trading company, there was no finding of fact by the Special Commissioners that the respondent was such a company or had traded since its incorporation in 1975. As for the Special Commissioners' finding of fact that the respondent had a change of intention from becoming a trading company back to that of an investment company, like the learned Judge we were satisfied that there was evidence in this case to support the finding of the Special Commissioners.

We also did not agree with Cik Zaleha that three of the four conditions referred to in *Leeming v. Jones* (*supra*) have been complied with as there were no findings on the evidence by the Special Commissioners that there was an organisation in existence nor were there any activities such as renovations and replacements as in the case of *Edwards v. Bairstow* (*supra*) which led to the maturing of the asset sold. In *Edwards'* case the machinery concerned was in fact sold in five separate lots whereas in this case there was only one isolated transaction of the

sale of subject land. In *International Investment Limited v. Controller-General of Inland Revenue* (*supra*) it is true that the Privy Council has held that a company whose business is or includes trading *prima facie* begins to trade as soon as it embarks upon the first transaction of a trading nature. In that case the Privy Council considered that the transaction in question constituted trading even if it was isolated. However, there was evidence in that case on which the Special Commissioners could conclude that the appellant company was carrying on a trade in immoveable property and the Privy Council held that there was no justification for reversing the determination of the Special Commissioners as it has not been shown that they have misdirected themselves in law, or proceeded without sufficient evidence in law to justify their conclusion. In the present case we did not agree with Cik Zaleha that there was any evidence of the badges of trade. No doubt the respondent had power in its memorandum and articles to deal with land but there was no evidence or any finding by the Special Commissioners that the respondent had in fact traded in land. We also did not agree with the contention of the Senior Federal Counsel that the formation of Gold Vale and other subsidiaries by the respondent in this case were activities which had led to the maturing of the asset which was sold. As stated earlier on, the learned Judge had pointed out that the subject land was not sub-divided and nothing was done to it by the respondent to improve its value which merely appreciated in course of time due to development of the surrounding area.

Here it is interesting to note the following passage in the judgment of Rowlatt J in *Thew v. South West Africa Co. Ltd.* 9 TC 141, 156 in which it was held that in the circumstances of that case there had been trading:

> In this case the question is whether profits which can be found in the prices realised for land sold by this company are to be included in their profits and gains for Income Tax purposes. That depends upon whether the profits to be found in such sales are part of the profits of a trade or concern in the nature of a trade carried on by the company.
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> For the present purpose, that is to say, for the purpose of ascertaining whether profits made upon a sale of an article are taxable profits, I think it is sufficiently accurate to say that it depends upon whether the article was acquired for the purposes of trade or not. In the case of a landowner who sells his land, or in the case of a man with valuable possessions who sells his books or pictures or plate or wine or what not, I take it that nobody dreams of taxing him upon the enhanced value which he may make when he sells these articles as compared with what he brought then for or what they were worth at the beginning of the year, if he is merely selling his possessions which he does not hold as a trader or with the view of a trader at all.

It must however be noted that Rowlatt, J's dictum was made in 1924 and it may safely be assumed that at that time the United Kingdom did not have any legislation similar to our Real Property Gains Tax 1976, to provide for the imposition of a tax on gains derived from the disposal of land and any interest or other right in or over such land.

In this case as we were satisfied, so was the learned Judge in the High Court, that there was sufficient evidence to support the Special Commissioners' determination that the respondent's sale of subject land did not constitute an adventure in the nature of trade and that gains or profit derived from the sale were therefore not chargeable to tax under s. 4(a) of the Income Tax Act 1967, the appeal was therefore dismissed with costs.

Also found at [1990] 2 CLJ 160